United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7211

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARIO LUBRANO,

Plaintiff-Appellant,

—against—

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S BRIEF

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Statement

This is an appeal from an Order and Judgment in favor of defendant entered on March 31, 1977 dismissing the Complaint.

The issue of liability in this case was tried on March 30, 1977 before Judge Charles S. Haight and a jury, the question of damages being held in abeyance. Defendant moved at the end of plaintiff's case for a directed verdict for failure to prove a prima facie case. The motion was granted and the Complaint dismissed by Order dated March 31, 1977 and the Clerk of the Court was directed to enter Judgment dismissing the Complaint. Such Judgment against plaintiff dismissing the complaint was entered that day. It is from this Order and Judgment that plaintiff appeals.

Issues

1. Did plaintiff make out a prima facie case of negligence against defendant?

2. Viewing the evidence in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences, were there sufficient facts in evidence for the jury to determine whether shipowner had an obligation to furnish dunnage when and where needed, for loading operations and did shipowner breach his obligation?

3. Is the question of foreseeability one of fact for the jury to determine?

4. If defendant was negligent was he nevertheless relieved as a matter of law for responsibility for the consequences of such negligence under the facts of this case?

The Testimony

Plaintiff, a longshoreman employed by Northeast Stevedores, was injured on December 27, 1972 on board a Royal Netherlands Steamship Co. vessel docked at the 39th Street Terminal, in Brooklyn, New York while loading 50 gallon drums of tallow in the square of the lower hold of Hatch #1. The accident occurred because of the slippery condition of the cargo on which plaintiff was required to work and because the shipowner failed to furnish necessary dunnage to make a flooring on top of the drums so that the longshoremen could work safely.

The loading of the ship started that morning and plaintiff's gang went into the lower hold of #1 hatch at 8:30 A.M. to commence their work (15a).* Drums of tallow are generally very greasy. This arises because the steel drums, when filled, overspill and the greasy tallow covers the outside of the drums. Working with drums of tallow is a "mess". The gloves used usually become saturated with grease in two hours and shoes worn become full of grease. Grease is everywhere and "anyone could see it" (40a, 45a-46a). The condition of the drums this day was very bad and there was grease all over. It was very slippery and they didn't have enough dunnage (21a-23a).

The use of dunnage as a flooring below and on top of drums was a necessity because the working surface would usually be slippery both to walk and work thereon and because steel being moved on top of steel with grease between them would be unsafe (23a, 42a, 44a).

The longshoremen had to walk thereon and stand on top of drums. Both plaintiff and other men were repeatedly slipping on top of the drums (22a, 34a).

At 8:30 A.M. the longshoremen placed plyboards supplied by the vessel on the floor of the lower hold, which was required, and then commenced stowing the drums on the flooring. The men repeatedly requested thereafter for more dunnage but none was supplied. Some dunnage was obtained from pieces left over from a ship that was there before but it was not enough. Very few pieces came down before the accident (39a, 47a, 41a, 22a-23a).

At the time of the accident plaintiff was moving the last drum on the second tier of drums. He was filling in

* Numbers with letter 'a' refer to Joint Appendix.

a space in cargo. The only dunnage available and used on the second tier was on the square where drafts were landed. He slipped and fell due to the grease on the drums and no wood flooring, sustaining injury (26a, 27a, 44a).

The shipowner was required to furnish the dunnage. Complaints were made to a ship's officer by the ship's foreman with respect to the condition of the cargo (slippery) and that dunnage was needed. Dunnage was requested of the ship's officer. There was some discussion about it and the officer informed the stevedore that they (shipowner) had ordered dunnage that morning and that they (shipowner) had to wait for the delivery to them (shipowner). In the meantime, they agreed with the stevedore that the longshoremen should continue in their work and "do the best we can" (41a, 42a, 52a).

The hatch boss, Ashley, who was with the ship's foreman and the ship's officer, testified:

> Q. How do you go about getting dunnage on board the ship, how do you go about acquiring dunnage? A. Well, we asked the ship did they have any more plywood. We were using some plywood at the time, but they didn't have any more plywood. So we used a few pieces of dunnage that were left over from the ship that was there before.
>
> That morning they were waiting, because the whole ship was being started, they were waiting for a delivery of more plywood, of dunnage, whatever came.
>
> Q. Who on the ship would you ask for the dunnage? A. I presume it was one of the officers, because that was the same fellow that I had got the stevedore to speak to to see if he could get some, *and they said we had wait and do the best we can until it arrive.*

Q. This particular person, when you had a conversation with him for the first time, where were you and where was he? A. We were both standing on the inshore side of the ship, next to the pier, talking to the stevedore at the same time.

Q. What did you say to him on that first occasion? A. Well, we asked for plywood, I mean, dunnage, and they said they didn't have it, we had to wait until it came.

Q. At that first occasion did you talk with him regarding the condition of the drums? A. Yes, we spoke about the drums, how bad they were, we needed stuff to cover the holes, because the men couldn't hold the drums sufficiently to really store them, it was unsafe.

Q. What did he say to you? A. *We had to do the best we can until we get something that we could work with.*

The Court: *Who said that?*

The Witness: *This was come from the stevedore and the ship.* We couldn't keep the 13 men standing by doing nothing until the plywood arrived (41a-42a).

This last conversation took place at about 9 A.M. and the accident occurred at 10 A.M. During this time the shipowner did not supply any dunnage to the longshoremen (44a). The reasoning used in the conversation between shipowner and stevedore for the continuation of the work and for longshoremen to do the best they could was that stevedore couldn't keep 18 men standing by doing "nothing until the plywood arrived" (42a).

The 39th Street Terminal where shipowner's vessel docked was used by two steamship companies—Prudential and Royal Netherlands (the defendant). Prudential had a specific place on the terminal where it kept its dunnage for use by its vessels. However, defendant did not have a specific place on the terminal to keep dunnage for its ships and they did not have an arrangement with Prudential to interchange the use of dunnage (51a-52a).

Hatch #1 where the accident occurred is a very small hatch and because of the contour of the ship at the bow, the lower hold was mainly in the square. The wings were approximately one drum wide. You can see into the hold from the top deck (18a, 40a, 43a).

Between 9 and 10 A.M. the ship's officer passed by the hatch constantly "looking at the ship" (43a).

The shipowner and stevedore had a manifest of the cargo to be loaded and between them made a plan from the manifest as to how they were going to load the ship (37a-38a).

POINT I

An invitee has a cause of action against shipowner to recover damages for injuries sustained by reason of the negligence of shipowner.

This is a case of shipowner's negligence causing an accident and injury to plaintiff, a longshoreman.

This action involves a hazardous condition on board ship which was open and obvious; involves insufficient equipment with the shipowner breaching its duty to supply sufficient and adequate equipment; and involves participation by the steamship company in the decision to have the longshoremen proceed with their work and do the best they could under the circumstances. It is a case coming squarely within the rule set forth in *Napoli* v. *Hellenic Lines Ltd.*, 536 F.2nd 505, 2 CA 1976, that a vessel is liable to longshoremen for injuries resulting from obvious dangers which it should reasonably anticipate that the longshoremen would be unable to avoid.

It comes squarely within the guidelines set forth in *Bess* v. *Agromar Line*, 518 F.2nd 738 (4 CA) and *White* v. *United States*, 400 F.2nd 74 (4 CA)—for if shipowner is required by contract, custom and usage or otherwise to furnish or supply equipment such as dunnage and fails to do so, it is liable in negligence for injuries that result.

Shipowner is still liable for its negligence.

33 U.S.C. §905 of The Longshoremen's and Harbor Worker's Compensation Act Amendments provides in Section 5(b):

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 33 of this Act."

The Senate and House Committee Reports, H.R. Rep. No. 92-1441 and S. Rep. No. 92-1125 on the legislation state that the intent of Congress was not to lessen shipowner's duties to longshoremen and felt it would increase the safety on board vessels by holding shipowner liable for its negligence.

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work.
>
> "Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action which it knows or should have known about a dangerous condition.
>
> "The vessel will still be required to exercise the same care as a landbased person in providing a safe place to work".

And the care required is reasonable care commensurate with the dangers to be encountered. It should be noted that the Committee stated that "longshoring remains one of the most hazardous types of occupations" so that the standard of care is necessarily a high degree of care.

Nor did Congress intend to relieve shipowner or permit the shipowner to relieve himself of responsibility for unsafe conditions on board a vessel. Congress looked to the shipowner to so conduct their vessel so as to reduce injuries to longshoremen. The obligation to improve occupational health and safety is imposed on shipowner and both Committee reports contained a direct threat addressed to the shipowner stating "The Committee expects to see further progress in reducing injuries and stands ready to immediately re-examine the whole third party suit question if it appears that the changes made in present law by this Bill have affected progress in improving occupational health and safety".

In *Napoli* v. *Hellenic Lines Ltd.*, supra, the Court stated that shipowner "was required therefore to exercise reasonable care under the circumstances to furnish plaintiff with a reasonably safe place to work". It held that where shipowner has notice of an obviously dangerous condition his duty of care to longshoremen exposed to such danger should be as set forth in Paragraph 343A of the Restatement of Torts (Second). In doing so they adopted the modern view expressed in the Restatement. The comment under Section 343 of the Restatement sets forth that 343 and 343a should be read together.

Furthermore, in said Comment under Paragraph b the Restatement sets forth:

". . . an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for

the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances."

Under Comment d it states:

What invitee entitled to expect. An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.

POINT II

The facts in this case show shipowner was negligent.

In our case the facts compel a finding of negligence. The cargo of drums of tallow was slippery, which was usual. Because of the very nature of the cargo and packaging of same it was imperative that dunnage be used as a flooring on the drums so that the working surface be made safe and so that cargo could be safely moved and handled. Defendant shipowner was required to supply sufficient dunnage when and where needed. This they did not do. The slippery condition of the drums and cargo was an open and obvious one known to the shipowner. Complaints were made to a ship's officer of the dangerous condition and the need for dunnage. Shipowner also knew

from experience that this cargo always required dunnage. Shipowner received the manifests in advance and hence knew of the nature of the cargo, the number of drums, and so the area to be covered by dunnage. Having the duty to supply the dunnage they knew at the time they had the stevedores commence loading that there was an insufficient amount of dunnage available for use. They also knew that to load this cargo in the space designated in the stow plan, there would be more than one tier of drums and the longshoremen would necessarily have to walk and work on top of a tier of drums. Instead of warning the longshoremen of the danger and the unavailability of dunnage which was necessary *before* starting loading, shipowner turned over the hatch in question to stevedores to bring their longshoremen on board and commence work. In view of the inherent nature of this type of cargo and inadequacy of the necessary equipment (dunnage) to be furnished by shipowner, the vessel was not a reasonably safe place to work at the time of the commencement of the work.

When it became apparent to the longshoremen that there was not enough dnnnage available to complete the stowing of these drums and in response to the request for such additional dunnage, the ship's officer and stevedore foreman, after a discussion between them, agreed that the longshoremen should continue loading and do the best they could. Shipowner claimed they ordered the dunnage *that* morning and they had to wait for it, as if that excused them for their failure to order same timely; or as if to excuse them for their not furnishing longshoremen with necessary dunnage when needed. Furthermore, the longshoremen continued loading this cargo and the ship's officer

stopped by at the hatch several times and saw the loading operations continue. At no time was any warning given by shipowner to their invitees (longshoremen). The resultant accident was inevitable.

The failure to warn the longshoremen and the decision to have longshoremen continue work under the circumstances merely compounded their negligent conduct.

Thus, plaintiff's claim of negligence is two-fold—(1) Defendant shipowner was negligent for the breach of its duty to furnish dunnage. Implicit in such duty is the obligation to furnish dunnage that is adequate and sufficient under the circumstances and furnish it when and where needed. Concomitantly with this is negligence of the shipowner in having longshoremen commence work and then ordering dunnage. They knew that to have longshoremen work with the cargo without dunnage would necessarily expose the plaintiff to harm. Failing to ascertain the amount and when dunnage is needed and failing to order same timely is indicative of failure to exercise reasonable care. To permit the longshoreman to go on board and commence loading without any warning that they did not have adequate and necessary dunnage to work with, was acting with complete disregard for the safety of those shipowner brought on board. This is particularly so when the danger is caused and created by shipowner who was in a position to prevent the hazard from being created and was in a position to correct it timely. (2) Defendant shipowner was negligent in failing to exercise reasonable care to furnish plaintiff with a safe place to work. Absent necessary dunnage and the necessity of loading, handling and working on top of slippery cargo of this type under

the circumstances, made the place of work not reasonably safe for use.

It is unreasonable to say that a steamship company operating a terminal does not know beforehand what cargo is at their terminal for loading onto their vessel and what dunnage is necessary and the amount available for use. It is naive to think shipowner, concerned about the stability of the vessel, does not know in advance what cargo is to be loaded and where to be stowed on the ship.

It should be noted that this was not an isolated docking of shipowner's vessel at this pier. This pier was shared by two shipping companies as a ship's terminal where their ships docked repeatedly. One of these shipping companies was the defendant.

POINT III

The issue of shipowner's negligence should not have been withdrawn from the jury. The dismissal of the complaint was error.

Bess v. *Agromar Line,* 518 F.2d 738 (4 CA) is particularly in point. There bales of paper were being loaded and the surface was uneven with spaces between bales. The plaintiff there requested plywood dunnage to provide a better working surface. The request was made of the stevedore. No dunnage was supplied but loading continued and plaintiff fell into a hole. It was claimed that the shipowner was negligent. There was no ship's crew on board; the stevedore was in sole control of the work; shipowner had no knowledge of the dangerous condition and could not reasonably have learned it. Plaintiff there claimed that ship-

owner breached its duty to provide suitable dunnage to be used in covering the bales. The District Court stated that

> "Since that theory of liability is based upon traditional negligence principles, it is clearly permitted by the 1972 Amendments to the Act. However, before that theory of liability could be submitted to the jury, the plaintiff must present evidence that the shipowner had a duty to provide the plywood dunnage. *The district court dismissed that aspect of the case, noting that 'there is no evidence before this court that the defendant was under any duty to provide dunnage,* OR *to have someone there to make it available,* OR *that there was the practice in the trade to provide dunnage'*" (p. 742).

The Circuit Court agreed.

Thus, the Court, in effect, said that if the shipowner had the duty to furnish dunnage or to have someone there to make it available or there was practice in the trade to provide the dunnage, the shipowner is liable for the results of failing to provide the dunnage. The lower court so held and was affirmed by the Circuit Court, stating that although the question of foreseeability was a question of fact for the jury, there was no evidence there that any duty existed on the part of the shipowner to provide dunnage under the facts in that case.

Of course, in our case there is that obligation on the part of shipowner to provide suitable dunnage and shipowner failed in its duty.

Furthermore, in the *Bess* case, the Court stated that shipowner's duty to the longshoremen did not end when it turned the vessel over to the stevedore. Subsequent duties

may arise depending upon the facts of the case citing *White* v. *United States*, 400 F.2d 74 (4 C.A. 1968) where it was held that the shipowner failed to provide plaintiff with a safe place to work by failing to have proper equipment.

In *Napoli*, the Court stated that under Section 343A of the Restatement, where there is an open and obvious danger, the shipowner is liable for failure to warn the invitee and to take corrective action where they could anticipate harm. Needless to say, shipowner should have anticipated harm in this case since they knew that the cargo was extremely slippery and men necessarily had to walk and work on top of same. Because they breached their duty to furnish the dunnage, the longshoremen had to walk and work directly on top of the slippery drums. Shipowner took no corrective action,—and the corrective action refers to the remedying the dangerous condition. It does not refer to the ordering of further dunnage which would become available to longshoremen in futuro when received by shipowner, and after these drums were completely stowed.

Furthermore, they could or should have anticipated harm because they had seen the working conditions which were hazardous, knew that they had not supplied any further necessary dunnage, and were at the hatch "looking at the ship" between 9:00 and 10:00 A.M. when the accident occurred, seeing the loading operations were continuing. They knew the men were working without the use of dunnage. Also, the practicalities of the situation should have at least warned shipowner to anticipate that in stevedore's view, once you start a gang of 18 men working you try not to stop them from continuing, even though there arises an increased risk to longshoremen. The hatch boss testified

you do not keep 18 men around doing nothing. This likewise inures to the benefit of shipowner as it saves them time and money. It would be interesting to hear the hue and cry from shipowner if stevedore had stopped the men from continuing their work and billed the shipowner for the detention. Thus, economically, any stoppage would be prohibitive. Yet socially, it was unacceptable to expose the longshoremen to danger unnecessarily.

The continuation of the work under unsafe conditions directly resulted from the negligent acts or omissions of the defendant.

Even if shipowner "suggested" to the stevedore to wait until dunnage arrives (which is *not* the evidence) it is no basis for a directed verdict in shipowner's favor. Just as foreseeability of continuation of the work and the resulting harm is a question of fact for the jury,—see *Bess* v. *Agromar Lines*, supra, so failure to heed a warning given by shipowner, if there had been such, merely goes to the question of contributory negligence and does not per se relieve shipowner of liability.

Napoli points out that an employee may not be able to avoid danger even though aware of it, the Court stating that his duties may require the unavoidable exposure to it. That is exactly what happened in our case. The Court stated:

> ". . . a vessel is liable to longshoremen only for injuries resulting from obvious dangers which it should reasonably anticipate that the longshoremen would be unable to avoid.
>
> In the present case, there was evidence from which a jury might conclude that the ship should reasonably

have anticipated that Napoli would not be able to avoid the danger despite its obviousness. The thrust of Napoli's testimony was that he had to stand on the plywood in order to carry out his duties of giving signals to the winchmen. Thus, it might be argued that if this was the only place for Napoli to work and carry out his job, the vessel might reasonably anticipate that he would use it despite its obvious danger, since the only alternatives would be to leave his job or face trouble for delaying the work. Should the jury be persuaded by this argument and find that the shipowner was negligent in not correcting the open and obvious danger but that the plaintiff was contributorily negligent, it would apply the doctrine of comparative negligence to reduce the shipowner's liability proportionately" (p. 509).

The foregoing quote is particularly applicable to our case.

Defendant shipowner was negligent in failure to provide for and furnish adequate dunnage which was necessary because of the nature of the cargo to be loaded. They were the ones best able to anticipate and prevent harm even before the longshoremen came on board the vessel. They should have taken corrective action timely, when it would have done some good and lessened the danger of working on these drums. They failed to do so and hence are liable for their negligence.

The Lower Court was in error in dismissing the complaint.

POINT IV

The lower court misconstrues the evidence and misinterprets the law so that it reaches the erroneous conclusion that even if shipowner were negligent he could not possibly be liable. This is not the law that prevails.

The lower court took the case away from the jury and dismissed the complaint. It is basic that on such motions and on this appeal the Court must consider the evidence in the light most favorable to plaintiff, and he must be given the benefit of all reasonable inferences which may be drawn in his favor. *Simblest* v. *Maynard,* 427 F.2d 1 (2 C.A. 1970).

The Court "interpreted" the evidence, finding testimony that simply did not exist. One could justifiably conclude from a reading of the Lower Court's Opinion that the Court was in error and was construing the evidence in the light most favorable to defendant, and where necessary, adopted defendant's claim as to the facts when their recollection was faulty.

The shipowner was negligent. The Lower Court took the position that even if there was an inference of negligence because shipowner knew drums of tallow were destined for loading on the vessel, and they should have anticipated the need for a greater quantity of dunnage, the consequence of such negligence was limited to the creation of an obvious hazard which plaintiff was aware of. Because of the Court's interpretation of the meaning of *Napoli,* it held that although shipowner was negligent it was not liable (83a footnote 3).

Despite the statute and Congressional intent that shipowner be held responsible for its negligence, (see also *Landon* v. *Lief Hoegh & Co.*, 521 F.2d 756 (2 C.A.), cert. den. 44 U.S.L.W. 3398), we now have a new interpretation to the effect that even though shipowner is negligent, if such negligence creates an obviously dangerous condition, shipowner is not liable.

Not even the courts in the most retrogressive areas in this country, who apply 19th Century Law without regard to social progress, hold that the shipowner's negligence does not make him liable. They would say that there is no negligence proven. The intricate reasoning to justify a finding of no liability has led the Lower Court here into serious error. Shipowner had a duty; it violated its duty and was, therefore, negligent. As a result of such negligence plaintiff was injured. The Lower Court sees nothing wrong with plaintiff assuming not only the risks of his employment but also those risks created negligently by shipowner. It is submitted that Congress never intended such a retrogressive and offensive result.

The Lower Court's decision is based on the finding that in the course of the progress of the work it was discovered that there was insufficient dunnage to safely continue with the work; that the vessel ordered additional dunnage and made the "sensible suggestion" that the longshoremen wait for the dunnage before continuing in the loading of the drums; that they did not anticipate that the longshoremen would continue to work in the face of obvious danger.

It is submitted that the Lower Court was in error as to the facts, in misinterpreting or in attempting to distinguish Napoli. There is no reason to make plaintiff assume the

risk of his employment. Any discussion or understanding between shipowner and stevedores or warning given by shipowner to stevedores does not satisfy the requirement of Napoli to at least warn the longshoremen (invitees). The ordering of additional dunnage on the morning of the accident was a belated futile act performed when it could correct nothing insofar as the loading of these drums was concerned. The delay was not an exercise of reasonable care and so, negligence. It would have been sensible for them to provide dunnage when needed and if short in supply to order same in advance. Waiting to order dunnage after the men started working makes no sense and indicates a reckless disregard for the safety of others.

The Circuit Court in Napoli stated that despite obviousness of danger a shipowner should nonetheless be required to take some affirmative action in order to discharge its duty of reasonable care which it owes to its invitees. The affirmative action referred to is not by ordering new dunnage to be delivered sometime in the future after the work was completed.

There was no warning given by the defendant to the plaintiff here. They participated with the stevedore in the decision to have the longshoremen continue to work despite the absence of dunnage. There was no "suggestion" to stop the work and there is no basis for the Court to so hold. It would appear in line with the Lower Court's erroneous consideration of the evidence in the light most favorable to the defendant, that the Court sought to save the shipowner from their responsibility imposed upon them not only by Napoli but by Section 414 of the Restatement of Torts 2d. Therefore the Lower Court gratuitously called

the participation by shipowner in the decision, a "suggestion".

Furthermore, even the alleged suggestion was made to the stevedores and was not a warning and not a warning to the longshoremen who were the invitees.

Being negligent and failing to furnish sufficient dunnage when and where required, the shipowner cannot escape responsibility for resulting injuries by saying we ordered the missing equipment but did not receive it as yet; we have to wait for it; when it comes you will get it. At best, such remarks if it constitutes a warning merely goes to the question of contributory negligence and it is a question of fact for the jury to determine. It is not a question of law to be passed upon by the Court.

Napoli held that under 343A of the Restatement, a vessel is liable for injuries from obvious dangers it should reasonably anticipate a longshoreman would be unable to avoid. The anticipation is not as to stevedore continuing work in the face of obvious danger, but in this case, where the plaintiff's duty as an employee may require his unavoidable exposure to the danger. Actually Napoli stated that if this was the only place to work and carry out his job, "the vessel might reasonably anticipate that he would use it despite its obvious danger" since the only alternative would be to leave his job or have trouble with his employer. The trouble referred to was not between longshoremen and shipowner nor between stevedore and shipowner but between stevedore and longshoremen. The defendant and the Lower Court confuse this "Hobson's choice" with one of their own creation, namely, that shipowner did not pressure the longshoremen to continue work

in the face of known danger and so the longshoremen could have done something other than to continue the work. The defendant is confused. Whether the plaintiff had a choice depended upon his employer and not shipowner; whether he had a job and earned his pay depended upon his obeying his employer's instructions not alleged suggestions made by shipowner to stevedore unbeknownst to the plaintiff.

Actually the pressure did come from the vessel. If shipowner was not interested in the longshoremen performing their work promptly, why did they have the stevedore bring its men on board to commence working when shipowner knew the place of work was not reasonably safe—as shipowner did not have available the necessary dunnage for the work then and there to be done?

The Court seems to find an answer to defendant's problems by claiming it "undertook to correct a dangerous condition". Unfortunately, shipowner did not correct or attempt to correct the existing condition. In undertaking to correct for the future, it did not help alleviate the existing dangerous condition under which the longshoremen had to work. Here they never corrected the unsafe condition, they supplied the dunnage after the accident occurred and after the loading of this cargo was completed. Acting with reasonable care, the shipowner was required to have sufficient dunnage provided for the work at hand and they should have ordered the dunnage before the work commenced so that the work could proceed expeditiously. However, the Court stated that there is no evidence that the shipowner's efforts were unreasonable. This is not correct. Failure to carry out its obligation when shipowner knew its failure

would endanger the longshoremen is negligence, which per se is unreasonable behavior under the circumstances. Remembering this is a ship terminal which shipowner operates, they should have provided for keeping dunnage readily available for necessary loading operations on board its ships. If Prudential Lines found it reasonable to keep dunnage available for its ships, what makes the Royal Netherland's failure to keep dunnage available for its ships a reasonable act?

He who undertakes to furnish equipment necessary for use must anticipate and be prepared to have such equipment available when necessary and sufficient in amount. The negligence is not only in failing to correct the dangerous condition but in failing in its duty to provide dunnage which obviously results in danger to longshoremen and makes the place of work unsafe. There would have been no necessity for correcting, if shipowner had exercised reasonable care.

Defendant's position on the argument of this motion for a directed verdict was the so-called traditional view which was not followed in Napoli,—but was rejected by this Court. They claim that the only duty to warn was of a latent defect, Napoli to the contrary notwithstanding. Since the defect in their view was patent, they had no legal obligation to the plaintiff. Defendant is not correct. Napoli adopted the modern view. Furthermore, the work performed did not create the unsafe condition but the lack of proper equipment did. The question of fact to be determined by the jury was whether the defendant failed to provide plaintiff with a safe place to work by omissions in providing proper and adequate equipment, which it was obligated to do.

In view of the foregoing, the Court, by directing a verdict in defendant's favor has misapplied the law and a miscarriage of justice has resulted.

CONCLUSION

The Order granting defendant's motion for a directed verdict and dismissing the complaint should be reversed: the Judgment entered against plaintiff pursuant to said Order should be vacated and a new trial should be ordered.

Respectfully submitted,

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Service of (2) Copies of the within Brief for Appellees is hereby admitted this 24 day of June 1977

Attys for Defendant Appellees

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